LIBRARY

No. 69-47

In the Supreme Court of the United States

OCTOBER TERM, 1970

[illegible] JOSEPH JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General,

JEROME M. FEIT,
Assistant to the Solicitor General,

ROBERT A. PATTERSON,
COLLEEN KOLLAR,
Attorneys,

Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument:	
Introduction and summary	7
I. This Court's decision in *United States* v. *Jackson* does not impair a prior conviction based on a jury verdict which did not contain a recommendation for the imposition of the death penalty	12
II. Petitioner was not prejudiced by the fact that the jury was instructed that it could impose the death penalty	18
III. The evidence as to lack of consent was sufficient	27
IV. The prosecutor's characterization of petitioner's defenses at trial as inconsistent was proper	28
Conclusion	29

CITATIONS

Cases:

Bailey v. *United States*, 405 F. 2d 1352	9–10, 16, 20, 21
Baldwin v. *New York*, 399 U.S. 66	26
Bloom v. *Illinois*, 391 U.S. 194	26
Brady v. *United States*, 397 U.S. 742	14, 15
Bruton v. *United States*, 391 U.S. 123	25, 26
Bumper v. *North Carolina*, 391 U.S. 543	8

418-223—71——1

Cases—Continued.

	Page
Crampton v. *Ohio*, No. 204, this Term, certiorari granted, 398 U.S. 936	16, 25
Desist v. *United States*, 394 U.S. 244	13, 16
Duncan v. *Louisiana*, 391 U.S. 145	26
Fisher v. *United States*, 328 U.S. 463	28
Frank v. *United States*, 395 U.S. 147	26
Gregory v. *United States*, 410 F. 2d 1016	21
Griffin v. *United States*, 336 U.S. 704	28
Halliday v. *United States*, 394 U.S. 831	13
Hoffa v. *United States*, 385 U.S. 293	27
Hyde v. *United States*, 225 U.S. 347	20
Jackson v. *Denno*, 378 U.S. 368	20
Katz v. *United States*, 389 U.S. 347	16
Linkletter v. *Walker*, 381 U.S. 618	16
Laboy v. *New Jersey*, 266 F. Supp. 581	17
McDowell v. *United States*, 274 F. Supp. 426	17
North Carolina v. *Alford*, No. 14, this term, decided November 23, 1970	14, 15
O'Callahan v. *Parker*, 395 U.S. 258	26
Pope v. *United States*, 392 U.S. 651	14, 15, 16
Price v. *Georgia*, 398 U.S. 323	11, 19, 20, 21, 22, 23
Ralph v. *Warden*, No. 13,757, C.A. 4, decided December 11, 1970	22
Roberts v. *Russell*, 392 U.S. 293	16
Robertson v. *United States*, 264 F. Supp. 146, affirmed, 394 F. 2d 823, certiorari denied, 393 U.S. 1057	17
Spencer v. *Texas*, 385 U.S. 554	24, 25
Spillers v. *State*, 436 P. 2d 18	17
Springfield v. *United States*, 403 F. 2d 572	22
Stein v. *New York*, 346 U.S. 156	20
Stovall v. *Denno*, 388 U.S. 293	13, 16

Cases—Continued Page

United States ex rel. Hetenyi v. *Wilkins*, 348 F. 2d 844, certiorari denied, 383 U.S. 913 11, 19, 20, 21, 22, 23

United States v. *Jackson*, 390 U.S. 570 2, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 20

United States ex rel. Wolak v. *Yeager*, 385 F. 2d 478, certiorari denied, 390 U.S. 999 21

Statutes:

D.C. Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473, 600 8

22 D.C. Code 2801 2, 3, 7–8

Miscellaneous:

H. Rep. No. 91–907, 91st Cong., 2d Sess. (1970) 8

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 5247

BARRINGTON JOSEPH JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the panel of the court of appeals (App. 306–315) is not reported; the *en banc* opinion of the court of appeals on rehearing (App. 328–337) is reported at 426 F. 2d 651.

JURISDICTION

The *en banc* judgment of the court of appeals was entered on March 23, 1970. On April 9, 1970, Mr. Justice Marshall granted an extension of time to May 22, 1970, within which to file a petition for a writ of certiorari. The petition was filed on May 18, 1970, and was granted on October 19, 1970.

QUESTIONS PRESENTED

1. Whether this Court's decision in *United States* v. *Jackson*, 390 U.S. 570, should be applied retroactively to question the validity of a prior rape conviction—pending on direct appeal when *Jackson* was decided—based on a jury verdict which did not contain a recommendation for the imposition of the death penalty.

2. Whether, if *Jackson* should be applied, petitioner was prejudiced by the fact that the jury was instructed that it could recommend imposition of the death penalty.

3. Whether there was sufficient evidence of lack of consent by the complainant to support the verdict.

4. Whether the prosecutor's closing argument was within permissible bounds in characterizing petitioner's defenses as inconsistent.

STATUTE INVOLVED

22 D.C. Code 2801, as in force at the time of petitioner's trial, provided in pertinent part:

> Whoever has carnal knowledge of a female forcibly and against her will * * * shall be imprisoned for not more than thirty years: *Provided*, That in any case of rape the jury may add to their verdict, if it be guilty, the words 'with the death penalty,' in which case the punishment shall be death by electrocution: *Provided further*, That if the jury fail to agree as to punishment the verdict of guilty shall be received and the punishment shall be imprisonment as provided in this section.

STATEMENT

After a jury trial in the United States District Court for the District of Columbia, petitioner was convicted of having raped Mrs. Louella Mayes on January 22, 1967, in violation of 22 D.C. Code 2801. The jury did not impose the death sentence and on February 23, 1968, petitioner was sentenced by the court to a term of imprisonment of from six to eighteen years. A panel of the court of appeals affirmed the conviction on June 20, 1969, one judge dissenting (App. 306–316). The court of appeals subsequently granted a petition for rehearing *en banc* and affirmed the conviction, four judges dissenting as to the sufficiency of the evidence and three judges dissenting on the issue whether the giving of the death penalty instruction required reversal (App. 328–347).

The government's evidence showed the following: Mrs. Mayes, a Nurse's Assistant in the Geriatrics Division of St. Elizabeths Hospital, testified that in the early morning of January 22, 1967, she left her home by car for St. Elizabeths Hospital to start work in the 7:00 a.m. shift. While en route, at approximately 6:20 a.m., her car stalled five or six blocks from St. Elizabeths near a gasoline station. She asked the attendant at the station for assistance and telephoned her husband to inform him of what had happened to the car. While she was in the telephone booth, petitioner drove into the station. He walked over to the phone booth and asked her what was wrong (App. 25–27, 46–50). On being informed that her car had stalled, petitioner offered to push it to St. Eliza-

beths Hospital. After conferring with her husband on the phone and being advised by the attendant that her car battery was apparently dead, Mrs. Mayes accepted the offer. Using his own car, petitioner then pushed Mrs. Mayes' vehicle to a point near the parking lot of the Geriatrics Division of St. Elizabeths. Mrs. Mayes inquired whether this was as far as he was going to push her and petitioner replied that someone in another car was blinding him with his lights. When the persons in that car had left, leaving the parking lot deserted, petitioner proceeded to push Mrs. Mayes' car into a space in the parking lot (App. 27–28, 49–52). As Mrs. Mayes was about to leave her car, petitioner approached and told her to move over. Mrs. Mayes said she could not since her front seat was divided by a console (App. 28, 52–53). Petitioner then pulled her by the arm from the car and put her in the front seat of his car by the driver's side. He got in beside her and drove off the hospital grounds, all the time holding her arm (App. 28, 53, 53–57, 75). Mrs. Mayes testified that she did not scream at this time and was "scared to death" (App. 55). She testified that petitioner told her that he knew she was scared because she was very nervous. Mrs. Mayes informed petitioner that she was suffering from a thyroid condition which added to her nervousness. While they were riding petitioner repeatedly told Mrs. Mayes that if she did not scream he would not hurt her (App. 28–29).

About five minutes later, petitioner drove into a gas station, putting his arm around Mrs. Mayes' neck and

warning her not to scream. The pressure on her neck coupled with her thyroid condition caused her to breathe heavily. While at the gas station, she made no outcry. After purchasing a dollar's worth of gas, petitioner drove to a deserted street where there were no cars or houses nearby (App. 29, 42–43, 57–59). En route, he asked her to take off her underclothes (App. 61).

After stopping his car, petitioner told Mrs. Mayes that there was no point in screaming because no one would hear her (App. 30). In response to some personal questions, Mrs. Mayes advised petitioner that she was married and had three children but did not love her husband (App. 30, 60). Petitioner then stated: "I told you to take your underclothes off" (App. 30, 61). When he started to reach for her, Mrs. Mayes told him that she would remove them herself and removed her stockings, girdle and panties (App. 30, 61–62). Petitioner thereupon pushed Mrs. Mayes down on the seat, pulled up her skirt, and had sexual relations with her, reaching ejaculation (App. 30–31, 63–64).

While petitioner was having sexual relations with her, Mrs. Mayes kept begging petitioner to take her back to work (App. 64). In addition, in order to make him stop, she at one point stated that she thought she heard cars and that the police were coming. Petitioner lowered the window of the car and informed her that there were no cars (App. 31, 79). Mrs. Mayes testified that during the entire time she was with petitioner, she thought he was going to kill

her although she never saw a weapon (App. 30, 58, 75).

After the act, petitioner told her to put her clothes on, that he was taking her back to work. As they drove back, petitioner said he guessed that he would never see her again; he stated that he would come back to St. Elizabeths to help her start her car but thought that she would probably have policemen everywhere. Mrs. Mayes replied that she would not call the police (App. 31–32).

On returning to the hospital grounds, petitioner took the keys to Mrs. Mayes' car and gave her a piece of paper with the name "Charles" and his correct phone number. He then drove her to the building where she worked, admonishing her not to look back to try to get his license number (App. 32–33, 67).

Upon entering the Geriatrics Building around 7:30 a.m., Mrs. Mayes went directly to the office of the acting supervisor, Mrs. Fushee, to tell her what had happened (App. 33, 68, 76, 173).[1] Mrs. Fushee called the head nurse and the 11th Precinct was notified. When the police arrived, Mrs. Mayes gave them a statement relating the events. She was later taken to D.C. General Hospital where she was examined

[1] Mrs. Fushee testified as a defense witness that when she first saw Mrs. Mayes, she appeared very upset and asked whether she could be relieved that day because she felt she could not perform her duties (App. 173–174). Upon taking her into the office, Mrs. Fushee noticed that Mrs. Mayes appeared to be trying to control her emotions. At this time, Mrs. Mayes started to cry and told her that she had been "accosted" (App. 174–175).

(App. 33–34). The tests confirmed recent sexual relations (App. 99–102).

On the basis of Mrs. Mayes' information and a description of petitioner's car, police apprehended petitioner that same afternoon in his car parked at the Geriatrics Division parking lot. Mrs. Mayes was returned to the scene and identified petitioner as the man who had raped her (App. 34–35, 104–107, 113). At that time, the police obtained Mrs. Mayes' car keys from petitioner and seized a pair of her gloves found in the car (App. 36–37, 107–108, 113–114). Subsequent examination of petitioner's undershorts and Mrs. Mayes' panties revealed the presence of spermatozoa (App. 139–140). Other expert testimony linked fibers found on Mrs. Mayes' clothing with fibers on petitioner's sweater (App. 133–136).

Petitioner admitted at the scene that he had pushed Mrs. Mayes' car. He stated that she had given him her car keys and had asked him to return to start her car (App. 110–111, 114–115). At trial, petitioner testified to the same effect. He denied having had sexual intercourse with Mrs. Mayes or that she had been in his car. He gave no explanation, however, for the presence of her gloves in his car (App. 201–206, 228–229).

ARGUMENT

INTRODUCTION AND SUMMARY

22 D.C. Code 2801, as in force at the time of petitioner's trial in January 1968, provided that

> * * * in any case of rape the jury may add to their verdict, if it be guilty, the words "with

> the death penalty," in which case the punishment shall be death by electrocution. * * *

and if the jury should "fail to agree" as to punishment, the punishment should be imprisonment for not more than 30 years.[2]

Before the jury was selected, the prosecutor advised the jury panel that, although rape was a capital offense, the government was not seeking the death penalty.[3] In his closing argument, the prosecutor merely asked the jury to return a verdict of "guilty as charged" and did not allude to punishment (App. 248, 265).[4] Thereafter, at the close of his instructions, the trial judge charged (App. 297–298):

> Now there are two possible verdicts in this case—I want you to listen very carefully to this portion

---

[2] Congress recently determined to eliminate the death penalty for rape rather than amend Section 2801 to conform with the holding of *United States* v. *Jackson*, 390 U.S. 570. See 84 Stat. 473, 600, part of the D.C. Court Reform and Criminal Procedure Act of 1970; see also H. Rep. No. 91-907, 91st Cong., 2d Sess.

[3] The prosecutor then inquired without objection whether, if any of the prospective jurors was opposed to capital punishment, this would preclude him or her from returning a verdict of guilty if the evidence so showed. Only one woman responded. She indicated that the possibility of the death sentence would prevent her from returning a guilty verdict and was subsequently excused. (App. 13–14, 17–18). Even if, in the light of *United States* v. *Jackson*, 390 U.S. 570, it was error in this pre-*Jackson* case to compose the jury as if this were a capital case, such error—contrary to the assertion in the *en banc* dissenting opinion below (App. 343–344)—cannot be presumed to have prejudiced petitioner on the issue of guilt. See *Bumper* v. *North Carolina*, 391 U.S. 543, 545.

[4] Due to an error in printing, the closing arguments are set forth in the joint appendix out of place at App. 240–265.

> of my charge: The first is not guilty. Of course, if you find that the defendant is not guilty, that is the end of the case, and you should return your verdict to that effect.
>
> If, however, you are convinced beyond a reasonable doubt that the defendant is guilty of the crime of rape, then the statute provides that you may, if you unanimously agree to do so, recommend to the Court that the death penalty attach. *The government is not seeking the death penalty.* I repeat: *the government is not seeking the death penalty,* but you may if you wish to do so, add the words, "with the death penalty" to your verdict of guilty, if you find him guilty.
>
> If you do not wish to have the death penalty imposed, or if you are unable to agree that the death penalty should be imposed, then you should merely return a verdict of guilty, and the Court will impose an appropriate penalty in due course. [Emphasis supplied.]

No exception was taken to the charge. The jury, after less than two and one-half hours of deliberation, returned a verdict of guilty, remaining silent on the issue of punishment (App. 299–300).

Subsequently in April 1968, while the present case was pending on direct appeal to the court of appeals, this Court decided in *United States* v. *Jackson*, 390 U.S. 570, that the similar death penalty scheme under the Federal Kidnapping Act was unconstitutional and hence unenforceable because it improperly encouraged guilty pleas and waivers of jury trials, while penalizing those who asserted their innocence and right to a jury trial. In *Bailey* v. *United States*, 405

F 2d 1352 (C.A.D.C.), the court of appeals declared that, under the rationale of *Jackson*, the death sentence provision in the District of Columbia rape statute, involved here, suffered from the same infirmity and was invalid.[5] *Bailey* was similar to this case in that the jury's verdict of guilty had not included a death penalty recommendation, and the court of appeals rejected on the merits the argument made by petitioner here. The conviction in the *Bailey* case was affirmed.

A.

Petitioner contends that reversal of his conviction for rape is required because the jury was, under the retroactive illumination of *Jackson* and *Bailey*, erroneously told that it could impose the death penalty. He suggests that, because the jury was instructed that it could return a range of verdicts from not guilty to guilty with the death penalty, the actual verdict of guilty without the death penalty may have been the result of an improper compromise. In our view, petitioner's contentions should be rejected.

1. First, it is inappropriate to apply this Court's decision in *Jackson* to question the validity of a prior rape conviction based on a jury verdict which did not include a recommendation for the imposition of the death penalty. Applying the three criteria established by recent decisions of this Court for determining the

[5] The Court further determined (405 F.2d at 1359) that its determination that the death penalty provision of the rape statute was unconstitutional would affect only those defendants whose trials had begun after April 8, 1968, the date of the *Jackson* decision.

retroactive applicability of decisions of the Court, we examine first the purposes of the *Jackson* decision. The purposes of that decision—to end the needless encouragement of guilty pleas and waivers of jury trials and to avoid penalizing those exercising their right to a jury trial—will not be significantly advanced by requiring an examination into non-death jury verdicts rendered prior to *Jackson*. This defendant was not induced to give up his right to trial by jury. Applying the other two retroactivity criteria, we conclude that trial judges prior to *Jackson* were justified in relying on the validity of *Jackson*-type statutes in formulating their charges to juries and that there would be a substantial burden on the administration of justice were *Jackson* applied retroactively to cases such as this one.

2. Even if *Jackson* were applied to this case, however, we submit that petitioner was not prejudiced by the fact that the jury was charged that it could recommend imposition of the death penalty. Petitioner's reliance upon *Price* v. *Georgia*, 398 U.S. 323, and *United States ex rel. Hetenyi* v. *Wilkins*, 348 F.2d 844 (C.A. 2), certiorari denied, 383 U.S. 913, is inapposite as the possibilities for jury compromise existing in those cases do not exist here. We stress three factors: First, it is most unlikely that the jury seriously considered imposing the death penalty as the government did not seek that punishment and there were few, if any, aggravating circumstances surrounding the crime. Second, even if the death penalty was considered, there was no need, as the trial judge

explicitly charged, for the jury to reach agreement on the issue. Thus, jurors who might have had doubts about petitioner's guilt could not have been pressured into giving up their doubts by other jurors expressing a willingness to drop their insistence on the death penalty, as such willingness was not a necessary precondition to the return of a unanimous verdict. Finally, there is no basis for assuming that the jury would disregard their instructions and commingle the issues of guilt and punishment in their deliberations.

B.

In response to petitioner's other contentions, we argue, first, that the majority of the court of appeals correctly concluded that the evidence before the jury was sufficient to support a finding that the victim had not consented to sexual intercourse, and finally that the prosecutor's comments during summation on petitioner's alternate theories of defense were not improper.

I

THIS COURT'S DECISION IN UNITED STATES V. JACKSON DOES NOT IMPAIR A PRIOR CONVICTION BASED ON A JURY VERDICT WHICH DID NOT CONTAIN A RECOMMENDATION FOR THE IMPOSITION OF THE DEATH PENALTY

Under recent decisions of this Court, three criteria are employed to determine whether and to what extent a decision of the Court establishing a new or changed rule of criminal procedure should be applied to upset criminal judgments that were previously entered. Those criteria are (1) the purpose of the

rule; (2) the extent of reliance upon the prior rule; and (3) the effect that retroactive application would have upon the administration of justice. See *Halliday* v. *United States,* 394 U.S. 831, 832; *Desist* v. *United States,* 394 U.S. 244, 249; *Stovall* v. *Denno,* 388 U.S. 293, 297. The same criteria can appropriately be used here to determine the extent of retroactive application of a decision striking down a penalty provision embodied in a federal statute. As the Court noted in *Desist, supra,* 394 U.S. at 249, the purpose to be served by the new rule is the foremost factor among the retroactivity criteria, and it is to that factor that we now turn.

The death penalty provision of the Federal Kidnapping Act was struck down in *United States* v. *Jackson,* 390 U.S. 570, because it imposed "an impermissible burden upon the exercise of a constitutional right" (390 U.S. at 572) and because the statute needlessly encouraged guilty pleas and waivers of jury trials (390 U.S. at 583). The purposes served by striking down the statute were thus to remove the burden on those electing a jury trial and to end the needless encouragement of guilty pleas and jury trial waivers. The two classes of defendants most directly affected were clearly those defendants who, prior to *Jackson,* had insisted on a jury trial and as a result, had been sentenced to death upon a recommendation from the jury, and those defendants who had pleaded guilty or waived jury trials at least in part to avoid the risk of incurring the death penalty. The application of *Jackson* to both these classes of defendants has been determined by this Court.

In *Pope* v. *United States*, 392 U.S. 651, the Court, acting on the government's suggestion, vacated a death sentence imposed under the Federal Bank Robbery Act (which was conceded to suffer the same constitutional infirmity as the Federal Kidnapping Act) and remanded the case for resentencing. There was no question but that Pope had in fact been penalized as a consequence of his exercising his right to a jury trial. Moreover, the very provision of the statute under which Pope was sentenced—the death penalty provision—was, under the *Jackson* holding, invalid. Execution of Pope under such circumstances would clearly be inconsistent with the primary thrust of the *Jackson* decision; accordingly, *Jackson* was applied retroactively to eliminate the death sentence.

Quite a different result was reached when the Court applied *Jackson* to prior pleas of guilty to kidnapping and second degree murder under analogous penalty schemes. See *Brady* v. *United States*, 397 U.S. 742; *North Carolina* v. *Alford*, No. 14, this Term, decided November 23, 1970. In both cases, the Court ruled that *Jackson* established no new criterion for assessing the voluntariness of guilty pleas (*Brady*, 397 U.S. at 747; *Alford*, slip op. 5) and that under the traditional standards both pleas were voluntary. Although neither decision was framed in terms of the retroactivity or non-retroactivity of *Jackson*, the decisions reflect a judgment that one of the purposes of *Jackson*—elimination of a needless encouragement to guilty pleas—did not in isolation require the invalidation of a prior guilty plea even though it could be shown, as in *Alford*, slip op. 2, that the guilty plea

was made specifically to avoid imposition of the death penalty. Thus, it is apparent that the factor controlling application of the *Jackson* principle is the avoidance of a statutory penalty for choosing a jury.

It is in the light of *Pope, Brady* and *Alford* that we turn to the applicability of *Jackson* to a previous trial where the defendant exercised his right to a jury trial and was found guilty, but did not receive the death penalty.[6]

In the next part of this brief, we argue that there is no basis for assuming that prejudice resulted in this case from the mere fact that the jury was instructed that it could impose the death penalty. Indeed, we believe that in *any* case where the death penalty was not in fact imposed by the jury, there is only an extremely speculative chance that the defendant was penalized by the defective punishment scheme in any material way, and so we urge that pre-*Jackson* guilty verdicts not recommending death should not be questioned. The distinction between *Pope* and the instant case is sharp in terms of the overriding purpose of *Jackson* to avoid penalizing those exercising their rights to jury trials. Where it is indisputable, as in *Pope*, that a person was so prejudiced, retroactive application is appropriate; where on the other hand any

[6] Of course, the present question, like the *Brady-Alford* question, would not have arisen had *Jackson* been foreseen: the jury would then not have been instructed about the death penalty, just as the judge would have explained to the pleading defendant that death was not a potential penalty.

prejudice is indirect and speculative at best, retroactive application is not appropriate. Indeed, *Pope* required only resentencing short of the death penalty, and cast no doubt on the guilty verdict, which is all that is involved here.

Petitioner asserts (Br. 10, n. 4) that *Jackson* should be applied retroactively here since the death sentence instruction undermined the integrity of the trial. While it is true that this Court has applied retroactively decisions fashioning rules designed to correct serious flaws in the fact finding process, see, *e.g.*, *Roberts* v. *Russell*, 392 U.S. 293, 294, *Stovall* v. *Denno*, 388 U.S. 293, 298, nothing in *Jackson* suggests that its purpose was to improve the quality of jury deliberations on guilt in capital cases. *Jackson* focused rather upon the penalty that could be imposed after a guilty verdict. This Court has never held that there is anything inherently suspect about submitting to a single jury questions of guilt and punishment.[8] The only

[7] Petitioner, citing *Linkletter* v. *Walker*, 381 U.S. 618, also asserts that the fact that this case was pending on direct appeal when *Jackson* was decided, mandates the application of that decision here without further inquiry. But the authority of *Linkletter* on this point was expressly undermined in *Desist* v. *United States*, 394 U.S. 244, 252–254, holding that *Katz* v. *United States*, 389 U.S. 347, would not be applied to decisions on direct review at the time of the *Katz* decision, but only to cases involving conduct occurring thereafter. A similar cut-off date is appropriate here, since only after the *Jackson* decision were trial judges on notice that death sentence instructions should not be given. This was the result reached by the court of appeals in *Bailey* v. *United States*, 405 F. 2d 1352, 1359 (C.A.D.C.).

[8] The impact of such a unitary proceeding on a defendant's privilege against self-incrimination is presently before the Court in *Crampton* v. *Ohio* No. 204, this Term, certiorari granted, 398 U.S. 936, argued at the December session.

reason that the jury's deliberative process is under attack here is because of the incidental presence of a statutory penalty scheme of the same type as was found objectionable to *Jackson*. Thus, the integrity of the jury's deliberations in this case is not brought into question by any basic principle of *Jackson*, but only as an incidental effect of an error under that decision which was made altogether harmless when the jury failed to recommend the death penalty. There is nothing in *Jackson* that requires its retroactive application to eliminate such an incidental and nonprejudicial effect.

The remaining two factors militating against retroactivity—justified reliance on the prior law and adverse effect on the administration of justice—also apply here, and suggest that *Jackson* should not be applied to this case. With the exception of the Nevada Supreme Court's decision in *Spillers* v. *State*, 436 P.2d 18, 22–23, the result in *Jackson* was not foreshadowed. On the other hand, prior to this Court's decision the reasoning of the district court in *Jackson* had been rejected by three other district courts. See *McDowell* v. *United States*, 274 F.Supp. 426, 429–431 (E.D. Tenn.); *Laboy* v. *New Jersey*, 266 F.Supp. 581, 584–585 (D. N.J.); *Robinson* v. *United States*, 264 F.Supp. 146, 151–152 (W.D. Ky.), affirmed (after *Jackson*), 394 F.2d 823 (C.A. 6), certiorari denied, 393 U.S. 1057.

Finally, reconsideration of all jury verdicts of guilty without recommendations of death returned under *Jackson*-type statutes would impose a substantial burden on the administration of justice. There

are presently approximately 50 persons in custody or on parole on pre-*Jackson* rape convictions under the D.C. statute following jury trials[9] and approximately the same number of federal prisoners in custody as of June 1969, following pre-*Jackson* jury trials for violation of the Federal Kidnapping Act,[10] although an unknown number of the latter prisoners may not have been charged in capital indictments. Finally, an undetermined number of state prisoners are in custody following jury trials for violations of statutes which either have been or may be construed to be defective under *Jackson*.[11]

II

PETITIONER WAS NOT PREJUDICED BY THE FACT THAT THE JURY WAS INSTRUCTED THAT IT COULD IMPOSE THE DEATH PENALTY

Even if *Jackson* does govern this case, petitioner's argument still depends on the presumption that the

[9] This figure was obtained as follows: Records of the Administrative Office of the United States Courts show that from 1952–1968, there were 171 convictions under the D.C. statute, of which 106 or 62 percent followed jury trials. D.C. Department of Corrections figures show a total of 71 prisoners in custody or on parole as of the filing of this brief who had been sentenced prior to April 8, 1968, the date of the *Jackson* decision. An estimated additional 9 prisoners are in the custody of the Bureau of Prisons for pre-*Jackson* rape convictions under the D.C. statute. Sixty-two percent of the total of 80 yields 50 persons now in custody who underwent pre-*Jackson* jury trials.

[10] Administrative Office figures show that there were 669 federal kidnapping convictions between 1951 and 1968, of which 184 or 28 percent followed jury trials. Twenty-eight percent of the 172 prisoners the Bureau of Prisons reports as in custody as of June 1969 for convictions prior to June 1968 is 48.

[11] See discussion at pp. 15–16 of our brief in *Brady* v. *United States*, No. 270, 1969 Term, a copy of which is being provided to petitioner's counsel.

jury verdict finding him guilty of rape was the product of a compromise between those on the jury who had doubts about petitioner's guilt and those in favor of imposing the death penalty. Otherwise, there would be no prejudice of any kind. Petitioner seeks to establish such a presumption by analogy to *United States ex rel. Hetenyi* v. *Wilkins*, 348 F.2d 844 (C.A. 2), certiorari denied, 383 U.S. 913, the rationale of which was adopted by this Court in *Price* v. *Georgia*, 398 U.S. 323. But those cases are not relevant here, and there is no other basis for the crucial presumption.

Both *Wilkins* and *Price* involved situations where, by virtue of the Double Jeopardy Clause, the defendant was improperly subjected to a second or third trial on a charge of first-degree murder, after a previous verdict of guilty of a lesser included offense had been reversed on appeal. Although in each case the later conviction was only for a lesser crime on which the defendant was properly triable, both cases held that the verdicts must be reversed. In *Wilkins*, the Second Circuit reasoned that submission of the barred parent count to the jury created a "reasonable possibility" of an improper compromise verdict. 348 F.2d at 864–867. In *Price*, the Court first concluded that, irrespective of the verdict reached at the second trial, the subjection of the defendant to a trial upon a charge for which he had previously been impliedly acquitted violated the Double Jeopardy Clause. The Court went on, in rejecting the State's claim of harmless error, to approve the *Wilkins* rationale, stating (398 U.S. at 331–332):

> * * * we cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence. See *United States ex rel. Hetenyi* v. *Wilkins*, 348 F. 2d 844 (C.A. 2d Cir. 1965), certiorari denied, 383 U.S. 913 (1966).[12]

Assuming arguendo that *Jackson* retroactively forbids the placing of the death penalty issue before the jury in this case, it remains that the possible prejudice to petitioner from that factor was in no way comparable to the prejudice thought to exist in the *Wilkins* or *Price* situations.[13] Our position is based on three

---

[12] The implications of *Price* are not wholly clear. The possibility of compromise, of course, exists whenever a jury returns a verdict of guilty of a lesser included offense, irrespective of whether the parent count was properly before the jury; *Price*, in our view, cannot and should not be read for the revolutionary proposition that all such verdicts are illegal. Although this Court has traditionally viewed compromise verdicts with disfavor, it has consistently held that such verdicts may not be impeached where to do so would violate the historic sanctity of the jury's deliberations and subject jurors to individual examination. See *Hyde* v. *United States*, 225 U.S. 347, 384–384; *Stein* v. *New York*, 346 U.S. 156, 178–179; cf. *Jackson* v. *Denno*, 378 U.S. 368. We interpret *Price* as holding that, although the possibility of a compromise verdict on a lesser included offense will not result in reversal where the various charges from which the possible compromise was spawned were properly before the jury, the same risk of compromise will not be accepted where one of the counts which the jury was told to consider was improperly submitted.

[13] The court of appeals in *Bailey* v. *United States*, 405 F. 2d 1352 (C.A.D.C.) rejected the analogy of *Wilkins* to rape cases

factors existing here, but not present in *Wilkins* or *Price:* (1) There was not a significant possibility in this case that the jury would recommend imposition of the death penalty; (2) there was no pressure on those jurors believing in petitioner's innocence to compromise their views; and (3) it cannot validly be assumed that the jury would ignore the instructions and commingle questions of guilt and punishment in their deliberations.

A. Two factors point to the improbability that the jury seriously considered sentencing petitioner to death. First, as we have noted, *supra,* pp. 8–9, the prosecutor advised the jury panel, prior to the selection of the jury, that the government was not seeking the death penalty, and this fact was emphasized by the trial judge in his charge (App. 298). Second, the nature of the crime was not such as to suggest consideration of the death penalty as there were virtually no aggravating circumstances.[14] The victim was not harmed (other than by the rape) and the use of force by petitioner to effect the rape did not rise to

---

where, as here, the government does not seek the death penalty. Apparently on the basis of *Bailey*, the *en banc* majority opinion below does not discuss the *Wilkins* issue. Cf. *Gregory* v. *United States*, 410 F. 2d 1016, 1018, n. 2 (C.A.D.C.); *United States ex rel. Wolak* v. *Yeager*, 385 F. 2d 478 (C.A. 3), certiorari denied, 390 U.S. 999.

[14] Cf. pages 66–77 of our *amicus curiae* brief in *McGautha* v. *California*, No. 203, this Term, and *Crampton* v. *Ohio*, No. 204, this Term. We show there that juries imposing the death penalty ordinarily do so on the basis of the presence of fairly obvious aggravating factors. A copy of that brief is being provided to petitioner's counsel.

the level of viciousness or brutality.[15] While the victim was transported against her will to a quiet street, she was returned by petitioner to her place of employment. Under these circumstances, we submit that, as the court of appeals concluded in another rape case where the government had not sought the death penalty, it was "overwhelmingly improbable" that petitioner was the victim of a compromise stemming from the jury's consideration of the death penalty. *Springfield* v. *United States*, 403 F.2d 572, 573 (C.A.D.C.).

B. Even if it were concluded, however, that the jury might have seriously deliberated over the death penalty, there was no force on individual jurors to compromise comparable to what might have existed in *Wilkins* or *Price*. In each of the later two cases, the jury had the option of finding the defendant (1) guilty of murder (the impermissible count before the jury), (2) guilty of a lesser included offense or (3) not guilty. Assuming that some jurors felt the defendant was guilty of murder and others had grave doubts as to whether he was guilty of any crime, the

---

[15] Compare *Ralph* v. *Warden*, No. 13,757, C.A. 4, decided December 11, 1970. In that case, the jury had imposed the death penalty after evidence had been admitted showing that the defendant had threatened to kill his victim and her child with a tire iron unless she submitted. The Fourth Circuit reversed, holding that imposition of the death penalty for rape violates the Eighth Amendment's prohibition against cruel and unusual punishment where the victim's life was neither taken nor endangered.

The court's opinion points out (slip op., pp. 17–18) that from 1960–1968, only 101 death sentences for rape were imposed in the civil courts, both state and federal, as compared with 190,790 reported rapes.

possibility of compromise existed. Before the jury could return a unanimous verdict of guilty of the lesser included offenses, those jurors believing the defendant guilty of murder would have to abandon their insistence on a verdict of guilty of murder and affirmatively consent to the lesser verdict; similarly, those jurors believing the defendant might be innocent would have to abandon their views on that score. Thus, one group might trade off its prerogative to hold out in order to bring the deliberations to a close.

The same dynamics could not reasonably be expected to prevail in a case like the present one. To be sure, as petitioner emphasizes (Br. 7), the jury had the option of returning one of three verdicts: (1) guilty with the death penalty, (2) guilty as charged, or (3) not guilty. And, as in the *Wilkins* and *Price* situation, the verdict returned had to be concurred in unanimously. It is also possible (although extremely unlikely, as we point out above) that some jurors felt that petitioner should receive the death penalty. What is critically different here is that, unlike the situation where those seeking a murder verdict must specifically abandon that quest and agree to the lesser verdict, it was not necessary for those jurors in favor of imposing the death penalty to abandon anything to enable the jury to return a verdict of guilty as charged, for their insistence on the death penalty necessarily presupposed a belief in petitioner's guilt of rape. Stated another way, the presence of the death verdict possibility *did not* alter the jury deliberations on petitioner's guilt from what they would have been

had the jury not been instructed about the death sentence. In either case, the ability to return a unanimous verdict depended upon *and only upon* resolution of petitioner's guilt or innocence. If all agreed he was guilty, deliberations could end since there was no further need, as the trial judge's charge explicitly indicated (see last quoted paragraph, p. 9, *supra*), to agree on the death penalty issue. Thus, the elements of a compromise—where each side must give up something to enable an issue to be resolved—were lacking; any juror believing petitioner was innocent was under no pressure stemming from the death penalty charge to compromise his view.

C. Finally, the instructions to the jury in this case were clear (see *supra,* pp. 8–9; App. 297–298): The jury was to determine first whether or not petitioner was guilty of rape; if convinced beyond a reasonable doubt of petitioner's guilt, then the jury could consider imposition of the death penalty. In the face of these clear instructions and upon the necessary presumption that juries are capable of following instructions, there is no basis for assuming that the jury so far departed from its instructed function as to commingle the questions of guilt and punishment in their deliberations.

Confidence in a jury's ability to follow instructions in a similar context was expressed by this Court in *Spencer* v. *Texas,* 385 U.S. 554, holding that the Due Process Clause of the Fourteenth Amendment does not require a separate jury trial on the issue of punishment under a state recidivist statute allowing the

jury to determine the issues of both guilt and punishment. Although noting that there were some possibilities of prejudice resulting from the unitary trial procedure and that a bifurcated trial as to punishment might be more fair, the court held that such speculative possibilities did not rise to the level of a violation of due process. In a passage particularly relevant here, the Court stated (385 U.S. at 565):

> It would be extravagant in the extreme to take *Jackson* [v. *Denno*, 378 U.S. 368] as evincing a general distrust on the part of this Court of the ability of juries to approach their task responsibly and to sort out discrete issues given to them under proper instructions by the judge in a criminal case * * *.

The principal focus of *Spencer* was on the possibility of prejudice arising from the introduction of evidence not germane to the issue of guilt but going solely to punishment.[16] Presumably, however, if the Court had thought there was a substantial possibility that the jury, in deciding the questions of guilt and punishment together, would arrive at a compromise verdict, it would not have found the unitary trial procedure compatible with due process.[17] In *Bruton* v.

---

[16] By contrast, no such proof was introduced in this case.

[17] An issue similar to *Spencer* is pending before this Court in *Crampton* v. *Ohio*, No. 204, this Term, certiorari granted, 398 U.S. 936. The case raises the issue whether protection of a defendant's privilege against self-incrimination requires a separate trial on the question of punishment in a capital case. There, as in *Spencer*, the arguments *pro* and *con* seem to have centered on the potential for prejudice arising from the jury's simultaneous exposure to evidence bearing on the questions

United States, 391 U.S. 123, the Court reiterated its view that, except in rare situations like the one there dealt with, reliance on the jury's ability to follow instructions is justified. 391 U.S. at 135.[18] See also *Duncan* v. *Louisiana*, 391 U.S. 145, 157.

These decisions exhibit, we submit, a proper reliance on the jury system. This court has in recent years greatly expanded the jury trial right. *E.g.*, *Duncan* v. *Louisiana*, *supra*; *Bloom* v. *Illinois*, 391 U.S. 194; *Frank* v. *United States*, 395 U.S. 147; *O'Callahan* v. *Parker*, 395 U.S. 258; *Baldwin* v. *New York*, 399 U.S. 66. It would be inappropriate to link that development with a line of decisions reducing the sphere in which juries are assumed to act competently. Compare *Bruton* v. *United States*, *supra*. Save in rare instances, if the jury system is to be effective, the courts cannot afford to indulge the presumption that jurors do not properly perform their function in criminal cases of weighing the evidence in the light of the court's instructions.

---

of punishment and guilt. If, however, the Court's opinion in *Crampton* were to speak to the unitary trial issue in terms of the rationale here relied on of an impermissible degree of likelihood of compromise, the decision would have relevance for this case. The United States has filed a brief as *amicus curiae* in *Crampton* which fully discusses this Court's prior decisions and other materials dealing with the ability of juries rationally to decide issues and to follow instructions in capital cases as well as generally. See Brief for the United States, pp. 66–82, 84–90, 107–125. Much of that discussion is pertinent here.

[18] Here, of course, the jury was instructed as to the elements of the offense, and that it should decide the question of guilt or innocence solely on the basis of the evidence presented (App. 289–295).

III

THE EVIDENCE AS TO LACK OF CONSENT WAS SUFFICIENT

Petitioner, while not discussing the question at length, relies on the dissenting opinion below for his contention (Br. 13–16) that the evidence as to lack of consent was insufficient. The facts detailed in the Statement (*supra*, pp. 3–7), fully support the contrary conclusion reached by the majority of the *en banc* court below. The majority properly held that Mrs. Mayes' testimony that she was in fear and thus acquiesced in sexual intercourse not voluntarily but in submission to the threats of petitioner was credible[19] and rationally rooted in the circumstances of the case. In effect, the majority also refused to impose on a woman threatened with death or bodily harm by an assailant the affirmative obligation to jeopardize her safety by physical resistance or an attempted public outcry.[20] This determination under a statute applicable only to the District of Columbia is reasonable and within the broad discretion which this Court has traditionally accorded to rulings by the court of appeals on local District of Columbia matters. See

---

[19] In deeming Mrs. Mayes' testimony as to her fear to be incredible, we think the dissenting judges exceeded their permissible function since only the jury had the opportunity to view the witnesses. See *Hoffa* v. *United States*, 385 U.S. 293.

[20] The only place the record shows such an outcry might have been effective was the gasoline station where petitioner stopped en route to the rape location. But at that time, petitioner had his arm around Mrs. Mayes' neck and she had difficulty breaching. (See pp. 4–5, *supra*.)

Fisher v. *United States*, 328 U.S. 463, 476–477; *Griffin* v. *United States*, 336 U.S. 704, 715–718. We therefore submit that the holding of the majority as to the sufficiency of the evidence should be sustained.

IV

THE PROSECUTOR'S CHARACTERIZATION OF PETITIONER'S DEFENSES AT TRIAL AS INCONSISTENT WAS PROPER

Petitioner contends (Br. 25–28) that the prosecutor's closing argument was improper in that it characterized his defenses—(1) that there was no sexual intercourse, and (2) that, if there was, the government had not proved that the act was non-consensual[21]—as being inconsistent rather than merely "alternative".

The contention is insubstantial. Its rejection evoked no dissent in the *en banc* court below. And the majority's opinion, although declining to deal with the point explicitly, noted that petitioner had argued "inconsistent defenses" (App. 337). Petitioner's trial counsel did not consider the prosecutor's argument unfair and made no objection or motion for mistrial based upon the alleged mischaracterization of which petitioner now complains.

The prosecutor's argument (set forth at App. 240–248, 258–265), did not go beyond the bounds of permissible advocacy. Whatever the subtle distinction urged by petitioner here between inconsistent and alternative defenses, it is clear that his second conten-

[21] These defenses were argued to the jury by defense counsel (App. 248–258).

tion as to failure to prove lack of consent assumed the very fact which the initial contention denied: namely, that the act of sexual intercourse had occurred. The jury (and hence the prosecutor in closing argument) had the right to draw unfavorable inferences from this dual position (see App. 337). There is no objection to the charge on burden of proof, which made clear to the jury what the prosecution must prove to convict.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

SAMUEL HUNTINGTON,
Assistant to the Solicitor General.

ROGER A. PAULEY,
COLLEEN KOLLAR,
Attorneys.

MARCH 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971